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U.S. Citizenship
and Immigration
Services

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BS

FILE:

EAC 04 070 51972

Office: VERMONT SERVICE CENTER

Date:

AUG 16 2005

IN RE:

Petitioner:

Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is an IT consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 20, 2000. The proffered wage as stated on the Form ETA 750 is \$80,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of November 2003. The beneficiary is a substitution, however, and the petitioner employed the original beneficiary of the labor certification in 2000 and 2001.

On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$600,000, net annual income of \$125,000, and to currently employ 10 workers. In support of the petition, the petitioner submitted 2003 pay stubs for the beneficiary.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 11, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted Form 1120 Corporate tax returns for the petitioner for the years 2000 and 2001. The tax returns reflect the following information for the following years:

	2000	2001
Net income before net operating loss deduction	(\$21,659)	\$25,715
Current Assets	\$29,973	\$4,819
Current Liabilities	\$17,579	\$1,810
Net current assets	\$12,394	\$3,009

In addition, counsel submitted copies of the Forms W-2 wage and tax statements issued by the petitioner to the beneficiary's predecessor. Those forms reflect wages of \$40,291.43 in 2000 and \$58,749.99 in 2001.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 5, 2004, denied the petition. In her decision, the director relied on the petitioner's 2001 net income *after* net operating loss deductions.

On appeal, counsel asserts that the petitioner's bank statements reflect sufficient wages to cover the difference between the wages paid to the beneficiary's predecessor and the proffered wage. The petitioner submits bank statements for 2000 and 2001.

Normally, reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, evidence would need to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. As will be discussed below however, the use of bank statements to cover the only two months in which the petitioner's net income is lacking after the November 2000 priority date is persuasive in this particular case.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2000 or 2001. The petitioner did, however, establish that it paid the beneficiary's predecessor. In 2000, the petitioner paid the predecessor \$39,708.57 less than the proffered wage and in 2001, the petitioner paid the predecessor \$21,250 less than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. That said, CIS looks at net income *before* net operating loss and special deductions. The director, however, erred in looking at the petitioner's 2001 net income *after* that deduction.

In 2001, the petitioner paid the beneficiary's predecessor \$21,250.01 less than the proffered wage. In that year, the petitioner shows a net income before net operating loss and special deductions of \$25,715. Thus, the petitioner has demonstrated its ability to pay the proffered wage in 2001.

It remains to determine whether the petitioner has demonstrated its ability to pay the proffered wage as of the date of filing, November 20, 2000. Regarding prorating, we emphasize that we will *not* consider 12 months of income or wages paid towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income or wages paid towards paying the annual proffered wage. That said, CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period) or other persuasive evidence.

We find that prorating is appropriate *in this case*. The priority date is less than two months before the end of 2000. The petitioner has established net income sufficient to establish its ability to pay the proffered wage in 2001. Thus, in finding that the petitioner had the ability to pay the proffered wage in 2001, we are not relying on cash that might have been expended to pay the proffered wage in 2000. On appeal, the petitioner submits bank statements for November and December 2000. These statements reflect an ending balance of \$63,592.81 and \$70,637.76 respectively. The prorated proffered wage for the 41 remaining days in 2000 is only \$8,800. The funds in the petitioner's bank account in November 2000 and continuing in December 2000¹ are more than sufficient to cover the proffered wage during the two months prior to 2001, when the petitioner's net income becomes sufficient to cover the difference between wages paid and the proffered wage. Moreover, while we typically balance current assets such as cash with current liabilities, the petitioner's net current assets (current assets minus current liabilities) are still sufficient to cover the prorated proffered wage as of December 31, 2000.² We note that, unlike net income, which covers a specific period, net current assets provide a financial picture as of a specific date.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.

¹ We would not consider funds in December that might have been expended to pay the proffered wage in November, but that is not an issue in this case as the balance in both months more than covers the difference between the wages paid and the proffered wage for both months.

² The petitioner's net current assets as of December 31, 2000 were \$12,394, more than the \$8,800 prorated proffered wage for the final 41 days of 2000.